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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1932. No. 40.

BERNARD L. SHAPIRO,
Petitioner,

v.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY,
Respondents.

RESPONDENTS' BRIEF ON THE MERITS.

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INDEX.

Page

I. Argument 1

A.

1. The procedure adopted by petitioner was improper 2

B.

1. The petitioner was not entitled to a jury trial in the State Court 5

2. The transfer and conveyance by Robinson to the corporation, Miller Robinson Company was not fraudulent 15

3. The formation of the corporation, Miller Robinson Company, did not operate to confer a colorable jurisdiction upon the District Court of the United States 26

CASES CITED.

	Page
Atlas Portland Cement Co. v. American Brick & Clay Co. et al., 280 Pa. 449	15
Barton v. Barbour, 104 U. S. 126, 133	8
Bentz v. Rockey, 69 Pa. 71	24
Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518	14-26
Bosworth v. St. Louis Term. R. Assn., 174 U. S. 182	21
Buchanan v. Warley, 245 U. S. 60, 74	16
Campbell v. Northwestern Eckington Imp. Co., 229 U. S. 561	6
Covanhovan v. Hart, 21 Pa. 495, 501	13
Clark Bros. & Co., Inc. v. Pou, 20 F. (2d) 74, 78	21
Delphia Knitting Mills Company, Inc. v. Richards, 62 Pa., Superior Ct. 9	15
Edward Murphy, 2nd, v. John Hoffman Co., 211 U. S. 562, 569	9
Field v. Kansas City Refining Co., 296 Fed. 800, 804, 805, 806	10-11-12
Harrison v. St. L. & S. F. R. R., 232 U. S. 318, 328	10
Hayes v. Columbus, etc. R. Co., 67 Fed. 630	11
Hennon v. McClane, 88 Pa., 219	14
Hyde et al. v. Stone, 20 How. 170, 175	10
Iowa v. Illinois, 147 U. S. 1, 7	5
Kohn v. McNulta, 147 U. S. 238, 240	9
Lake Shore Banking Co. v. Fuller, 110 Pa. 156	24
Lehigh Mining and Mfg. Co. v. Kelly	29
Lippincott v. Barker, 2 Binn. 174, 183, 184	24

	Page
Love v. Clayton et al., 287 Pa. 205	24-25
M'Allister v. Marshall, 6 Binn. 338, 347	24
M'Clurg v. Lecky, 3 P. & W. 83, 91	24
Metcalf v. Moses, 161 N. Y. 587	3
Miller v. Shriver, 197 Pa. 191	24
Miller and Lux v. East Side Canal Co.	29
Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U. S. 211, 217	9
Montgomery Web Co. v. Dienelt, 133 Pa. 585	15
Omnia Commercial Co., Inc. v. United States, 261 U. S. 502, 508	20
Pearson v. Yewdall, 95 U. S. 294, 296	9
Re Metropolitan Railway Receivership, 208 U. S. 90, 110, 111	28
Riehle v. Margolies, 279 U. S. 218, 223	21
Schloss v. Schloss, 14 App. Div. 333 (N. Y.)	3
Shibler v. Hartley, 201 Pa. 286, 287, 288	14-24
Shields v. Coleman, 157 U. S. 168	21
Southern Realty Co. v. Walker	29
Terral v. Burke Constr. Co., 257 U. S. 529, 531	6
The Pusey & Jones Co. v. Hanssen, 261 U. S. 491	30
The York County Bank v. Carter, 38 Pa. 446, 453, 454	14-24
Wabash Railroad Co. v. Adelbert College, etc., 208 U. S. 38, 54	9
Werner v. Zierfuss, 162 Pa. 360, 365, 366	14-24
Wilt v. Franklin, 1 Binn. 502, 513, 515	23
Zerbe v. Miller, 16 Pa. 488	14

Page

CONSTITUTION OF THE UNITED STATES.

Seventh Amendment, USCA Const. Part 2, p. 581 7

ACTS OF CONGRESS.

Judicial Code, sec. 37, 28 USCA §80 26

Judicial Code, sec. 66 28 USCA §125 11

CONSTITUTION OF STATE OF PENNSYLVANIA.

Article 1, section 6, PS, Const. Art. 1 §6 8

STATUTES OF STATE OF PENNSYLVANIA.

Act of May 21, 1921, No. 379, ... 18

sec. 2, P. L. 1045, 1046, 39 PS §352 18

sec. 4, P. L. 1045, 1046, 39 PS §354 18

sec. 5, P. L. 1045, 1047, 39 PS §355 18

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RESPONDENTS' BRIEF ON THE MERITS.

BRIEF OF ARGUMENT.

ARGUMENT.

This brief on behalf of respondents is designed to discuss four questions—(A) one of them raised by the respondents as to the right of petitioner to maintain the proceedings as instituted by him; (B) the other three, the material and relevant ones raised by the petitioner in his brief, covered by petitioner's assignments of error, 1, 2, 3 and 4 (Petitioner's Brief pp. 8 to 25).

A.

THE PROCEDURE ADOPTED BY PETITIONER WAS IMPROPER.

The propriety of the procedure adopted by petitioner was questioned by the respondents both in the District Court and in the Circuit Court of Appeals. Presumably, both Courts felt it was not necessary to adjudicate the question.

Whether there is merit or otherwise in his charges, the petitioner is not entitled to attempt to raise the question in the manner here present. He has violated two elementary rules—(a) by a collateral and indirect attack on the receivership proceedings; and (b) by failure to join the necessary parties.

(a) The petitioner does not question the prima facie right of the District Court to appoint the receivers and to issue the injunction. He, possibly unconsciously, admits that the proceedings in and the decree of the United States Court as they were when he filed his petition are effective and binding upon him until such proceedings are set aside or such decree is modified or revoked. He admits that he does not desire an opportunity to attack directly the actions of the parties or the validity of the receivership, and expressly disclaims a desire to vacate or void the proceedings as a whole. His demand is that because his petition states conclusions that the actions of persons named therein were fraudulent—conclusions that he made no effort to support—he has the right to indirectly set aside and revoke the receivership proceedings and the effect thereof for his exclusive and sole benefit, and this by an action in a State court into which court he would compel the receivers to come to defend the jurisdiction and power of the United States Court and the effect of its decrees, and to defend the actions of the persons. This result he would accomplish by proceeding in a separate

and different action, which action would eventually lead to a jury trial.

The jurisdiction and the right of a court which appoints a receiver will be upheld by every legitimate inference. Wherever a court has jurisdiction of the subject matter and of the necessary parties, its action in appointing receivers, whether such action is erroneous or not, cannot be questioned in a collateral proceeding. Some scattered State court decisions contain an intimation that a collateral attack may be made if the transaction is fraudulent. An examination of these cases, such as Metcalf v. Moses, 161 N. Y. 587, and Schloss v. Schloss, 14 App. Div. 333 (N. Y.), shows that there were present and adjudicated in such cases bad faith, a bald and patent scheme to defraud creditors, false and fraudulent statements to the Court and/or suppression of material facts in obtaining the appointment—practically a fraud on the Court—and not merely unsupported allegations of such conditions and averments of conclusions from such allegations. Practically universal is the sounder, and, it is respectfully submitted, the only safe, rule, that if it is claimed that a receivership and the effect thereof are to be questioned, the proper and only proceeding open is to attack them directly where the parties whose actions are criticized may have the opportunity to meet the attack. The possibilities of any other rule are too obvious to need comment.

(b) The second rule violated is that which requires that every litigant have his day in court. If it be assumed, for the sake of argument, that in a proper form of proceeding petitioner had set forth sufficient to warrant his demand, he has failed in his duty. He bases his complaint upon the actions of Robinson and the action of Robinson and McLean. They are the ones who are charged as perpetrating the fraud. There is no charge that the receivers had any part in the transaction. The right to have the receivers appointed to conserve their

respective interests in the property was of value to Robinson and to McLean, without considering other creditors or parties. The petition was not directed against Robinson and McLean. It was directed against the receivers. The persons whose actions are the foundation upon which petitioner's demand was built were therefore not made parties to the proceedings and the record shows no effort to that end. The granting of the petition would conclude Robinson and McLean without any opportunity to be heard on any consideration of charges against them involving their good faith and without an opportunity to defend the validity and force of the protection which the Court had set up at their request on prima facie proper grounds.

B.

The petitioner in this case bases his claim on three grounds:

I. THE PETITIONER WAS ENTITLED TO HAVE A TRIAL BY JURY IN A STATE COURT OF THE ALLEGATION OF FRAUD IN HIS PETITION AND THE ORDERS OF THE LOWER COURTS UNCONSTITUTIONALLY DEPRIVED HIM OF SUCH RIGHT.

II. THE TRANSFER AND CONVEYANCE BY THE INDIVIDUAL, ROBINSON, TO THE CORPORATION, MILLER ROBINSON COMPANY, WAS FRAUDULENT.

III. THE FORMATION OF THE CORPORATION, MILLER ROBINSON COMPANY, UNDER THE LAWS OF THE STATE OF DELAWARE WAS IN ORDER TO CONFER A COLORABLE JURISDICTION UPON THE UNITED STATES DISTRICT COURT, AND SUCH FORMATION, THE TRANSFER OF THE ASSETS OF THE INDIVIDUAL ROBINSON TO THE CORPORATION, AND THE APPLICATION FOR THE

APPOINTMENT OF RECEIVERS WERE ELEMENTS OF A PLAN OF ROBINSON TO DELAY, HINDER AND DEFRAUD HIS CREDITORS.

It is conceived that the points above set forth are the only material and relevant subjects of discussion, and it is purposed to discuss these in the order above set forth.

I.

THE PETITIONER WAS NOT ENTITLED TO A JURY TRIAL IN THE STATE COURT.

The petitioner complains (Petitioner's Brief pp. 8, 13) that by the action of the Courts below he was unconstitutionally deprived of his right to trial by jury in the State court on the question whether or not there was an intent on Robinson's part to hinder, delay, and defraud creditors when he made the conveyance to the corporation, and this was followed by the application for the appointment of receivers.

This case is before the Court as a result of proceedings had on a petition filed by the petitioner in the lower court. To this petition there was a responsive answer filed by the respondents. No depositions or other form of testimony was submitted to the Court below.

The matter was argued on petition and answer.

Mr. Justice Field in Iowa v. Illinois, 147 U. S. 1, 7, says:

> "By setting down the case for hearing on the bill, answer and replication, (without taking any testimony) and on the cross bill and answer to it, all the facts alleged in the answer to the original bill, as well as those alleged in the cross bill and not denied in the answer, are thereby admitted."

See also Terral v. Burke Constr. Co., 257 U. S. 529, 531;
Campbell v. Northwestern Eckington Imp. Co., 229 U. S. 561.

The entire and complete fact situation, as set forth in the record, is as follows:

(a) Herbert P. Robinson, on and prior to January 9, 1931, was engaged individually in the retail lumber business under the name of Miller Robinson and Company. (R. 17).

(b) Prior to and on January 9, 1931, he was indebted, among others, to petitioner in the sum of $1000.00. (R. 11).

(c) On January 9, 1931, the business was solvent to the extent of $100,000.00, that being the value of assets of the business over and above its indebtedness. (Petitioner's Brief pp. 7, 30, 31 —R. p. 3).

(d) On January 9, 1931, a charter was obtained by Robinson, a citizen of the State of Pennsylvania, under the laws of the State of Delaware, for a corporation known as Miller Robinson Company with an authorized capital of $100,000.00. (R. pp. 12, 17).

(e) On January 9, 1931, Robinson by deeds and other writings conveyed and transferred all the assets of his business to the corporation Miller Robinson Company. (R. pp. 12, 17, 18).

(f) The expressed consideration for the transfer was the issuance to Robinson of $99,000.00 of the capital stock and the assumption by the corporation of all debts of the business and the agreement to pay the same. This assumption and agreement included specifically by name, among others, the petitioner and the amount due him. (R. pp. 3, 4, 7, 18).

(g) The purpose of Robinson in the formation of the corporation was to continue in corporate form the business in which he had been theretofore engaged as an individual. (R. pp. 17, 18).

(h) On January 12, 1931, Robinson and one John N. McLean, a creditor in the sum of $8000.00, filed in the District Court for the Eastern District of Pennsylvania their Bill setting forth, inter alia, that Miller Robinson was solvent; that because a suit had been brought against it, and others threatened, there was danger of dissipation of assets. They prayed the Court to appoint receivers for the corporation. (R. 2).

(i) With the Bill there was filed an Answer by Miller Robinson Company admitting the averments of the Bill and joining in the prayer. (R. 7).

(j) On January 12 and 13, 1931, the Court appointed respondents as receivers. (R. 8 to 11).

(k) The usual injunction order prohibiting suits and levies against Miller Robinson Company appears in the decree appointing the receivers. (R. 10).

(l) On January 16, 1931, the petitioner brought suit against Robinson individually on the above mentioned indebtedness and judgment was duly entered therein. (R. 11).

The petitioner sets forth and relies on the 7th Amendment to the Federal Constitution and Section 6 of Article I of the Constitution of the State of Pennsylvania.

The 7th Amendment is as follows:

> "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of

the United States than according to the rules of the common law."

The Constitution of the State of Pennsylvania, Article I, Section 6, provides:

> "Trial by jury shall be as heretofore, and the right thereof remain inviolate."

The petitioner does not seek a jury trial in the Federal Court. His demand is that without challenging directly the right of the Federal Court to hold possession of the assets of this corporation, he be permitted to compel the receivers to become party to proceedings in another court where the result might be serious damage to the property held by the receivers for the benefit of creditors. His proposed action is to be by way of a writ of fieri facias out of the State court (R. pp. 14, 15), under which the property in the hands of the receivers would be seized—this anticipating that the receivers would then be compelled to put in a property claim on which an issue could be framed on a sheriff's interpleader in the State court, thus resulting in a trial by jury in that court in the matter of the alleged fraudulent conveyance by Robinson.

It is respectfully submitted that the 7th Amendment to the Constitution of the United States has no bearing on the matter now before this Court.

It seems equally clear that Article 1, Section 6 of the Constitution of the State of Pennsylvania, relied on by the petitioner, does not apply.

The right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If the case belongs to this class the trial of the question belongs to the court itself no matter what may be its importance or complexity.

Barton v. Barbour, 104 U. S. 126, 133.

See also

Kohn v. McNulta, 147 U. S. 238, 240.

In the case of Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U. S. 211, 217, Mr. Chief Justice White said:

"the first ten Amendments, including of course the seventh, are not concerned with state action and deal only with Federal action."

The 7th Amendment to the Constitution of the United States applies only to courts sitting under the authority of the United States:

Pearson v. Yewdall, 95 U. S. 294, 296.

In Wabash Railroad Co. v. Adelbert College, etc., 208 U. S. 38, 54, Mr. Justice Moody said:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

In Edward Murphy, 2nd, v. John Hofman Co., 211 U. S. 562, 569, Mr. Justice Moody said:

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. *The court having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property.* In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdic-

tion of all other courts, although otherwise the controversy would be cognizable in them." (Italics ours.)

See also Field v. Kansas City Refining Co., 296 Fed. 800, 804, 805 (CCA 8th), Certiorari denied 266 U. S. 618.

The jurisdiction of the United States District Court could not be impaired by anything appearing in the Constitution or laws of the State of Pennsylvania. That Constitution does not require that the District Court shall surrender its possession of the property involved in this matter in order that the petitioner may have a jury trial as he demands.

In Hyde et al. v. Stone, 20 How. 170, 175, Mr. Justice Campbell said:

"• • • this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases, State laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

In Harrison v. St. L. & S. F. R. R., 232 U. S. 318, 328, Mr. Chief Justice White said:

"It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion or authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it."

This petitioner did not bring his suit in the state court until Januay 16, 1931 (R. 11), four days after the appointment of receivers in the case at Bar. (R. 8).

The demand of this petitioner has been passed upon by two courts and refused. The District Court, under Section 66 of the Judicial Code (28 USCA Section 125), and indeed, it is conceived, under its general equitable powers, undoubtedly had the authority to permit the petitioner to proceed as he demanded. The matter was one entirely within the discretion of the District Court and it is respectfully submitted that in no manner does it appear that the exercise of the discretion of the Court was erroneous or that such discretion was abused.

In Hayes v. Columbus etc. R. Co., 67 Fed. 630, it is stated that the Court should not permit the receiver to be made a party to proceedings in another court where the result may be a dismemberment of the property held for the benefit of creditors and lienors.

In Field v. Kansas City Refining Co. et al., 296 Fed. 800, 806, (CCA 8th), where property of a street railway was in the custody and control of receivers of a federal court, and it was held that the court below was right in refusing to permit an action to be brought in the state court concerning the right to property in the possession of the receivers, Judge Kenyon said:

"The discretion rested in the United States District Court to permit action to be brought in the state court or to prevent it and have the questions determined in the United States court. Unless this discretion in granting the injunction order against the defendant proceeding to final determination in the state court was improvidently exercised, this court will not interfere."

Certiorari denied, 266 U. S. 618.

The petitioner did not ask that the receivership be dissolved so that the assets would be subject to his levy. His demand is that because he has averred a fraudulent transaction the Court should surrender possession of the property which is in its charge for the benefit of all creditors and permit him to compel the officers of the Court to appear in a State court and defend the action of the Court of appointment. The language of Judge Kenyon in Field v. Kansas City Refining Co., 296 Fed. 800, 805, above cited, is particularly applicable to this attitude. Judge Kenyon says:

> "If the contention of appellant is sound, then the Federal Court is powerless to protect the property in the hands of the receiver, and the very purpose of the receivership to conserve and preserve the property for the benefit of all the creditors is destroyed."

In addition to the absence of right as above set forth, it is submitted that there is no controversy and no issue of fact to present to a jury. The entire fact situation is established and there is no controversy as to it. If the property had been converted into cash, or if it had been conveyed to the corporation without its assumption of the liabilities of the individual, or if it had been placed under the control of others, or if there had been a denial in the

answer of any of the facts alleged in the petition, or if the object of Robinson was not apparent from his actions, an issue of fact might result because it might be considered that such actions were equally consistent with an intent to do right and with an intent to do wrong. Here the actions speak for themselves and leave no room for doubt or speculation. The property which he conveyed was not concealed, was not removed, and remained subject in all respects to the same liability as to which it was subject immediately before the transfer. Instead of an action the result of which might have been to remove the assets or some part of them from the reach of creditors, Robinson's action was the reverse. Having completed the formation of the corporation, upon the appearance of danger to the interests of the creditors of the corporation (who were also his creditors) he co-operated in placing all of the property which had been transferred to the corporation in the hands of the Court so that it should be kept intact for the benefit of all parties interested therein—the reverse of a situation from which there might be drawn from either action an inference of a fraudulent intent or effort.

The province of a jury is to find facts and if necessary to draw inferences having the effect of facts. The conclusion to be reached as to the legal effect of such facts is for the court alone. Where there is no question as to the facts of the transfer fraudulent intent is not a question for the jury and should not be submitted to it. The District Court and the Circuit Court of Appeals each concluded there was no fraud.

In Covanhovan v. Hart, 21 Pa. 495, 501, where it was held that a conveyance of land by a debtor, who was in failing circumstances, to a creditor to pay an existing debt was not fraudulent, although the parties contemplated that thereby the claims of other creditors would be defeated, Mr. Chief Justice Black said:

"The judge said in his charge that little room is left to attribute fraudulent motives, when a debt is actually due from the vendor nearly equal to the value of the property. He should have said there is no room at all. *A human tribunal can take no cognizance of feelings and intentions which are not manifested by external conduct.* We are not permitted to assign a bad motive to an act which is not wrong either in itself or in its necessary consequences. . . . The act being right, no secret feeling can change its character. Indeed it may be said that the motive which results in proper action cannot be a bad one."

In The York County Bank v. Carter, 38 Pa. 446, 454, a somewhat similar case, Mr. Justice Strong said:

"A jury is not at liberty to deduce fraud from that which the law pronounces honest."

Werner v. Zierfuss, 162 Pa. 360, 365, 366;
Shibler v. Hartley, 201 Pa. 286, 287, 288.

See also

Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518.

The Pennsylvania cases cited by the petitioner (Petitioner's Brief, pp. 21, 22, 23) do not support his contentions.

In Zerbe v. Miller, 16 Pa. 488, the conveyance was by a father to his son, and intended to delay and hinder creditors and prevent them from taking the property in payment of their debts.

In Hennon v. McClane, 88 Pa. 219, there was involved a conveyance of land in consideration of future maintenance.

In Montgomery Web Co. v. Dienelt, 133 Pa. 585, there was a transfer by one corporation to another of all its property, except a small amount to satisfy a landlord's claim, and the new company assumed all the debts, except one, of the old company, the rest of the creditors assenting to the transaction. In this case, the conveyance was held to be fraudulent as to the excluded creditor.

In Delphia Knitting Mills Company, Inc. v. Richards, 62 Pa. Superior Ct. 9, an individual engaged in business transferred all his assets to a corporation organized by him, caused the stock to be issued to his wife, and thereafter continued in absolute control of the business and assets transferred.

In Atlas Portland Cement Co. v. American Brick & Clay Co., et al., 280 Pa. 449, it was held that when individuals or corporations transfer their property to a new corporation, substantially owned and controlled by the transferers, the new corporation takes the property subject to the rights of persons who have claims against the transferers.

In all of these cases the acts of the transferers were questionable as to the object and purposes sought to be accomplished. On their surface they appeared to be attempts to defeat the claims of creditors, and the manner and form of the transfer were such as could have resulted in a defrauding of the creditors or some of them. It was necessary, therefore, in those cases that evidence be submitted to ascertain the actual intent. In this case no such conditions exists.

II.

THE TRANSFER AND CONVEYANCE BY ROBINSON TO THE CORPORATION, MILLER ROBINSON COMPANY WAS NOT FRAUDULENT.

It is not clear from the petitioner's brief whether he now charges actual fraudulent intent, or merely fraud in

law. The petitioner's brief in some parts contains language which could be read to include the former. On page 19, however, he says:

> ". . . So far as we understand the statement we believe the Court intended to imply that the petitioner attempted to prove no fraud in fact. If so, that is quite correct."

If petitioner now asserts actual fraudulent intention or act, it is respectfully submitted that the record shows just the reverse.

The transaction under consideration is perfectly clear and discloses no element of fraud on creditors or anyone else. It does disclose a condition and a transaction very prevalent and of which innumerable examples could be cited—the action of a man who has concluded to change the form in which he has been conducting a business so that instead of carrying on as an individual, he will carry it on in corporate form.

Robinson, solvent, with no suits pending or judgments entered against him, was complete master of the business and the property thereof. There could be no limitation on his right to form a corporation and to form it under the laws of such State as he chose.

In Buchanan v. Warley, 245 U. S. 60, 74, Mr. Justice Day said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land."

Possessed of this right, and under such conditions, Robinson formed his corporation. He transferred to it all the assets of the business. None went to the control of or became subject to the claims of other persons than those who were creditors. He maintained complete control of the assets. To protect his creditors he caused the corporation to issue to him all its capital stock, representing the value of the assets of the business in excess of its liabilities, and also caused the corporation to expressly assume and agree to pay all debts. There can be no question that the debt due to this petitioner was expressly assumed because he is specifically named as one of the creditors to be paid by the corporation. The statement that all the capital stock was issued to Robinson is made because it is assumed that this Court will, as did undoubtedly the Courts below, realize that one thousand dollars of stock was issued in the name of others in order to qualify them as directors.

There is nothing in the record upon which to base the thought that by these actions Robinson endeavored or had any reason to endeavor to hide his assets from his creditors and there is nothing in his actions to indicate any desire to defraud his creditors. Every action indicates his purpose to protect his creditors and conserve his assets to meet his obligations. He made no effort to relieve himself of his personal liability. There was no attempt to substitute the corporation for himself as the debtor. Nothing was done which deprived, or which was intended to deprive, this petitioner or any other creditor of the security afforded by the assets of Robinson as they existed immediately before the formation of the corporation. In the face of the assumption by the corporation of the liabilities the petitioner could not predicate his claim of fraud on the proposition that the property was placed by Robinson beyond the reach of his creditors.

The petitioner presumably bases his claim of legal fraud on the Uniform Fraudulent Conveyance Act of the State of Pennsylvania of May 21st, 1921, (No. 379, P. L. 1045, 1046, 1047; 39 PS Sections 352, 354, 355) and the English statute, 13 Elizabeth (Petitioner's Brief, pp. 20, 21). The pertinent portions of the Pennsylvania Act are Sections 2, 4 and 5.

Section 2 of the Act reads, in part, (P. L. 1046; 39 PS Section 352):

> "A person is insolvent when the present, fair, salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and mature."

Section 4 reads (P. L. 1046; 39 PS Section 354):

> "Every conveyance made and every obligation incurred by a person *who is or will be thereby rendered insolvent,* is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or obligation is incurred without a fair consideration." (Italics ours).

Section 5 (P. L. 1047; 39 PS Section 355) reads:

> "Every conveyance made without fair consideration, *when the person making it is engaged, or is about to engage, in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital,* is fraudulent as to creditors, and as to other persons who become creditors during the continuance of such business or transaction, without regard to actual intent." (Italics ours).

The meaning of a word must be strained to assume that the formation of the corporation under the facts of

this case and the transfer to it of the assets was a "conveyance" as that word is used in the quoted sections of the Uniform Fraudulent Conveyance Act. If, however, it be assumed that the legislature intended that the changing by one of his method of doing business should be considered a "conveyance", in no way does this transaction measure up to the other requirements of the Act.

It is not asserted by petitioner that Robinson was made insolvent by the transfer to the corporation. On the contrary, he concedes that Robinson was solvent after the transfer by the sum of $100,000.00 (Petitioner's Brief pp. 7, 31). The record shows this condition (R. 3).

It may be of interest to note in connection with this phase of the matter that nowhere is it alleged that any fictitious value had been placed upon the assets which Robinson transferred to the corporation. It therefore appears that he received two valuable considerations for this "conveyance"; that is to say, he received (if a strict construction of the situation be had) capital stock of the corporation, which stock it is admitted represented the value of the assets transferred, in the amount of $99,000.00, over and above the liabilities and indebtedness of the business. In addition to the foregoing, he received the agreement of the corporation to assume liability for and to pay every debt which Robinson owed in connection with the business and which assumption would, of course, amount to an agreement to indemnify. There is nothing on the record to show whether Robinson had other assets; it might be assumed that he had no other assets but he would have and did have a worth of $100,000.00 and the agreement of the corporation (which by reason of its possession of the assets had ample property to perform its undertaking) to indemnify him again all his debts. There is likewise nothing in the record to show that Robinson had any debts other than those assumed by the corporation. This assumption of liability and the agreement to pay the debts was an asset of value.

Contract rights are property:

Omnia Commercial Company, Inc. v. U. S., 261 U. S. 502, 508.

Robinson, therefore, was not rendered insolvent by the "conveyance" and received full consideration.

Nor does this transaction come within Section 5. Robinson did not engage or evidence any intent to engage in any business or transaction other than the business in which he had theretofore been engaged. He maintained complete and sole control of the business. It is admitted (R. 17, 18) that his very purpose was to continue the business which he had theretofore carried on as an individual with exactly the same assets. There is nothing to show any intent otherwise. It is deemed not improper at this point to suggest to this Court that the Circuit Court of Appeals in its opinion states that with the exception of two creditors, practically all the creditors were satisfied with the course Robinson took (R. 24).

The application for the apopintment of a receiver for the corporation is not evidence of an intent to defeat the claims of Robinson's creditors or to hinder and delay them fraudulently. It could not have such an effect. It is true that Robinson as a stockholder was one of the plaintiffs. The other plaintiff was a creditor for an amount eight times that of the petitioner and one who occupied exactly the same position as petitioner and had the same rights as petitioner. The averment in the application for the appointment of receivers is that a suit had been brought against the corporation and others were threatened, and the consequent danger of dissipation of the assets because of the inability of the corporation to meet its maturing obligations. The inferences contained in the petitioner's statement of the case are not supported by the record.

Whatever was the reason, the effect of the appointment of the receivers was to make it impossible for Robinson or anyone alse to remove the assets from the reach of creditors. All of the property, subject as it was to liability for all the debts of Robinson, was thereby placed in the hands of the Court which held it for the benefit of all parties interested therein and as their rights then existed.

The receivers were merely stakeholders:

Shields v. Coleman, 157 U. S. 168;
Bosworth v. St. Louis Term. R. Assn., 174 U. S. 182.

In Riehle v. Margolies, 279 U. S. 218, 223, Mr. Justice Brandies said:

"The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection, and distribution of the assets."

In Clark Bros. & Co., Inc. v. Pou, 20 F. (2d) 74, 78 (CCA 4th), Judge Northcott said:

"It must be remembered that the receivers, while standing in the place of the Co-operative Association, have an additional duty as officers of the court, and that upon them rests the burden of standing impartially between all parties concerned, with the further obligation, in so far as they possibly can, to protect the rights of all parties. 'It is as much the duty of a receiver, in administering an estate, to protect valid preferences and priorities as it is to make a just dis-

tribution among the general creditors.' 23 R. C. L. under title 'Receivers,' §118, and cases there cited."

The petitioner at the time of this action had no lien or claim against the specific property. Even if there had been a fraudulent transfer in fact, the petitioner would have been compelled to institute an action in order to acquire a lien against the fund. To say that under the circumstances this petitioner is entitled to the demand he makes would be to controvert the thoroughly grounded rule that one of the purposes of a receivership is the restraining of indiscriminate levies and executions in order that the property involved may be preserved from dissipation and waste and equal distribution be made to those entitled thereto.

It is respectfully submitted that there can be no construction of Robinson's acts up to the point of and including the formation of the corporation and the transfer of its assets as indicating an intent to defraud or as having the legal effect to that extent. The receivership in this case was not on Robinson's application alone and if there is any fraud to be assumed by reason thereof it must be held that a creditor in a sum eight times as much as that of the petitioner joined in that fraud. The petitioner has drawn and has referred to inferences as to the reasons for the application for the receivership. If we eliminate the inferences which the petitioner has referred to and has drawn, there is nothing in the record which shows with any clearness the reasons for the application for the receivership. If it be assumed, however, that upon the formation of the corporation the bringing of suit by a creditor and the contemplation of other suits, with the accompanying fear of dissipation and loss of and depreciation in the value of the assets, a situation was created which made it seem desirable or advisable to the greater body of creditors and to Robinson to ask for the appointment of a

receiver, such action cannot be considered a fraudulently collusive one rendering the proceedings for and the appointment of a receiver fraudulent.

It is settled law in Pennsylvania that a transaction which has for its object the payment of all creditors, and which places them on an equal footing is not fraudulent.

In Wilt v. Franklin, 1 Binn. (Pa.) 502, 513, 515, there was a conveyance of a debtor's assets to a trustee for the purpose of putting his creditors on an equal footing. The transaction was sustained against a judgment creditor who claimed it was fraudulent under the statute 13 Elizabeth. In this case Mr. Chief Justice Tilghman said:

> "The manifest intent of *Keely* was to prevent *Wilt* from obtaining any preference by his judgment, and to put all his creditors, without exception, on an equal footing. There appears to be nothing immoral or unfair in such intent. On the contrary, it is the object of well regulated societies, where commerce flourishes, to obtain an equal division of the property of insolvent traders. The statute of 13 *Eliz.* c. 5. (the provisions of which go no further than the common law as *now* understood) never had it in contemplation to invalidate a *fair* transaction. It was made to avoid fraudulent conveyances, intended for the purpose of defeating, hindering, or delaying creditors of their just debts. . . . It may be objected, that this case comes within the words of the statute, because *Wilt* has been *hindered, delayed,* and in part *defeated,* by this deed. It is true he has been delayed and partly defeated, but not in a fraudulent manner. We must give the statute a reasonable construction. *Wilt* would have been delayed and partly defeated, if, immediately after the commencement of his suit, *Keely* had, with the consent of all his other creditors, executed a deed to trustees of the creditors' own choice,

for the purpose of disposing of his estate, and dividing the proceeds equally among them. But I imagine no one would contend that in such case the conveyance was not good." (Part of italics ours).

Lippincott v. Barker, 2 Binn. 174, 183, 184;
M'Allister v. Marshall, 6 Binn. 338, 347;
M'Clurg v. Lecky, 3 P. & W. 83, 91;
The York County Bank v. Carter, 38 Pa. 446, 453;
Bentz v. Rockey, 69 Pa. 71, 76, 77;
Lake Shore Banking Co. v. Fuller, 110 Pa. 156, 162, 163;
Werner v. Zierfuss, 162 Pa. 360, 365, 366;
Miller v. Shriver, 197 Pa. 191, 195;
Shibler v. Hartley, 201 Pa. 286, 287, 288;
Love v. Clayton et al., 287 Pa. 205, 215.

While the element does not exist in the case at Bar some of the cases cited above go to the extent of holding that the transaction is valid notwithstanding that particular creditors are preferred thereunder.

Thus, in The York County Bank v. Carter, 38 Pa. 446, 453, supra, partners being heavily indebted, transferred their entire property to another party in consideration of the satisfaction of his claim against them and his assumption to pay the balance of purchase money in discharge of partnership debts due certain other specified creditors. It was held that the transaction was not void because certain creditors were preferred if there was no intent to delay, hinder or defraud the others. Mr. Justice Strong said:

"'The statute of 13 Eliz. is aimed only at intended fraud. But the payment of a debt to one creditor is no fraud upon another creditor, no legal injury to him. It was remarked by Chief Justice Gibson, in Gans v. Renshaw, 2 Barr. 36, that "though an insolvent

debtor may give such preferences to particular creditors as he may see proper, yet if the motive be not payment of his debts, but, in the language of the statute, to 'delay, hinder, or defraud' particular creditors, it is not *bona fide*, and therefore not saved by the proviso." This, however, does not militate at all against the well settled doctrine that a debtor may prefer one creditor to another intentionally, and if his honest purpose be to pay a debt, the preference is not fraudulent, either in law or in fact. Other creditors may be delayed and hindered, but 'not in a fraudulent manner,' as was said by Tilghman, C. J., in Wilt v. Franklin, 1 Binn. 514."

In Love v. Clayton, et al., 287 Pa. 205, 215, it was held that a transfer of business property, contemplating a continuance of the business, is valid, although the transfer consists of several instruments, if the instruments, when read together, are seen to constitute one transaction, indicating an intention to assign the property for the benefit of creditors, Mr. Justice Kephart said:

"While a preference to creditors may be sustained under given conditions, even where it prevents other creditors from obtaining payment of their claims, if there be an honest intent to pay the preferred debt (The York County Bank v. Carter, 38 Pa. 446; Miller v. Shriver, 197 Pa. 191, 195; Lake Shore Banking Co. v. Fuller, supra, 163), courts will seize any opportunity to strike down such a transaction where fraud is intended, as a violation of the statute. There must be an intent to delay, hinder and defraud creditors. In the present case, take the entire series of transactions. *It was not a transfer to pay those who signed, but it set up a scheme whereby 'all' creditors would be paid.*" (Italics ours.)

III.

THE FORMATION OF THE CORPORATION, MILLER ROBINSON COMPANY, DID NOT OPERATE TO CONFER A COLORABLE JURISDICTION UPON THE DISTRICT COURT OF THE UNITED STATES.

Section 37 of the Judicial Code (28 USCA Section 80) provides:

> "If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The facts in the case at Bar do not bring it within the scope of the foregoing language.

In Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 524, 525, a suit was brought by the respondent, a Tennessee corporation, against the petitioner, a Kentucky corporation, to prevent interference with the carrying out of a contract by the respondent for a certain railroad. The respondent was organized by the shareholders of a Kentucky corporation having a similar contract with the railroad. The business and property of the Kentucky corporation were transferred to respondent and the former dissolved. The respondent's incorporators and the railway representa-

tives, preferred to have the controversy determined in the courts of the United States and therefore arranged to have the respondent organized in Tennessee to succeed to the business of the Kentucky corporation and to enter into the contract in suit in order to create a diversity of citizenship. It was held that there was no fraud upon the jurisdiction of the District Court under Section 37 of the Judicial Code. Mr. Justice Butler said:

"The requisite diversity of citizenship exists. And the controversy is real and substantial. The privilege granted is valuable. Petitioner treats the contract as invalid and claims to be entitled, without the consent of the railroad company to use railroad property to park its vehicles and solicit business. The railroad company has failed to protect the rights if granted. The motives which induced the creation of respondent to become a successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction. McDonald v. Smalley et al., 1 Pet. 620, 624. It is enough that respondent is the real party in interest. Smith et al. v. Kernochen, 7 How. 198, 216. The incorporation of the respondent or its title to the business and contract in question is not impeached. Coöperation between it and the railroad company to have the rights of the parties determined by a federal court was not improper or collusive within the meaning of §37. Re Metropolitan Railway Receivership, 208 U. S. 90, 110. Harkin v. Brundage, 276 U. S. 36. South Dakota v. North Carolina, 192 U. S. 286, 311. It requires no discussion to distinguish Lehigh Mining and Mfg. Co. v. Kelly, 160 U. S. 327, and Miller &

Lux v. East Side Canal Co., 211 & S. 293. The District Court had jurisdiction."

In Re Metropolitan Railway Receivership, 208 U. S. 90, 110, 111, it was held that a bill for a receiver should not be dismissed as collusive, because the defendant corporation admitted all the facts averred and joined in the prayer for a receiver, and it appeared that the bill was filed in the Federal Court because the parties to the suit desired the administration of the corporation's affairs should be in the hands of that court. Mr. Justice Peckham said:

> "It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts, named in the bill as owing to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject matter of the litigation unto the Federal courts, instead of proceeding in one of the courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant."

The cases cited in petitioner's brief on page 14, (Miller and Lux v. East Side Canal Co., Southern Realty

Company v. Walker, and Lehigh Mining Company v. Kelly) are not applicable to the present case.

Miller and Lux v. East Side Canal Co. did not involve a receivership but was a suit between individuals. In that case a suit had been commenced in the California State courts by a California corporation. The stockholders or officers of the corporation concluded that it was advisable to have the suit in a Federal court. They thereupon formed a Nevada corporation and the assets of the California corporation were transferred. The only purpose of this was to create an ostensible diversity of citizenship. The suit in the State court was then discontinued and a suit on exactly the same grounds was instituted by the Nevada corporation in the United States Court. The California corporation continued in existence. This Court held that the transaction was merely a device to obtain the federal jurisdiction desired by the California corporation; that the Nevada corporation was not the real party in interest; that its ownership was a sham because the ownership of all its stock by the California corporation gave the latter full power to control the litigation, to cause its withdrawal or prosecution; that the real party was the California corporation because it had at any time the power to compel a reconveyance of the assets.

Lehigh Mining and Mfg. Co. v. Kelly was a suit between individuals. The plaintiffs' grantor remained in existence and in full control of the suit. The action of the Court was because of its conclusion that the plaintiff corporation was formed solely for the purpose of securing federal jurisdiction with the full intent of the parties to reconvey the property when the litigation was over and their purpose served.

In Southern Realty Company v. Walker, the facts clearly show that the plaintiff corporation was formed by two citizens of Georgia for the purpose of holding title to lands owned by those citizens and in order to obtain fed-

eral jurisdiction in litigation concerning the lands which it was desired to institute against other citizens of Georgia. In this case also it appeared that complete control of the corporation was continued by the real parties in interest.

In all of these cases there was an actual fraud on the Court. In none of them was the nominal plaintiff the real party in interest. In all, control of the actions, direction and control of the litigation and the property involved remained in the hidden parties. In the case at Bar, both parties plaintiff had a real and substantial interest and were acting to protect their respective separate interests. Nothing appears to show or justify the contention that the formation of the corporation was for the purpose of obtaining a receivership. The reverse is demonstrated by the admitted fact that Robinson originally formed the corporation for the purpose of continuing in corporate form the business in which he had been engaged. By the action of Robinson and McLean all control of the proceedings and of the property involved passed irrevocably from Robinson and from McLean. One of the powers of the Courts which they invoked made it impossible for Robinson to exercise rights which might have been in him by reason of his holding of stock. McLean's action amounted to a voluntary surrender on his part of his right to proceed against the defendant corporation for the collection of his admitted indebtedness.

In the case at Bar the parties are the actual parties in interest and the subject matter presented in the application for the appointment of the receivers was real and substantial. It needs no discussion to demonstrate that the privilege granted is valuable and it is respectfully submitted that the case in all material respects is identical with the Black & White Taxicab Case, supra.

The objection that the complainant McLean was improperly joined as a party complainant for the reason that he is a simple contract creditor is without foundation. It is true that in The Pusey & Jones Co. v. Hanssen, 261

U. S. 491, it was held that under the facts in that case receivers should not have been appointed but this was because the corporation objected and denied that the complainant was a creditor and that the company was insolvent. Justice Brandeis held that the objection did not go to the jurisdiction of the court, and could be waived. He says at page 500:

> "The case at bar is also unlike Re Metropolitan Railway Receivership, 208 U. S. 90, 109, 110, and many others, in which there was express consent by the corporation to the appointment of the receiver, or where the indebtedness to the plaintiff and the corporation's insolvency were admitted, or the lack of jurisdiction in equity was waived. The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a federal court. . . . And where the defendant has expressly consented to action by the court or has failed to object seasonably, the objection will be treated as waived."

The record shows that McLean and Robinson were citizens of the State of Pennsylvania; that the defendant is a Delaware corporation; that McLean is a creditor to the extent of $8000.00; that Robinson is the holder of capital stock of the corporation. The defendant company by its Answer (R. 7) admitted the averments and joined in the prayer for the appointment of a receiver.

The order of the Court below was fully justified and its action in entering the order dismissing the petition filed therein was proper and should be affirmed.

Respectfully submitted,

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October 19, 1932.